IN THE CIRCUIT COURT OF LUNENBURG COUNTY, VIRGINIA.

E. G. STOKES et als. *v.* C. C. HATCHETT.

May 1, 1912.

1. Elections—The Effect of Declaring Void—Filling Vacancies.—Under § 160 of the Code, the necessary consequence of declaring an election void, is to create a vacancy, and imposes upon the court, or the judge thereof, in vacation, the duty of filling such vacancy by appointment, as no power is given by the statute to order another election.

2. Failure of County Electoral Board to Appoint Judges—Effect.—The failure of the Electoral Board of a county to appoint judges and clerks of election in March or May, conformably with the provisions of §§ 68 and 117 of the Code, and the appointment of such judges and clerks by the action of two members of said Board, in the following October, and in the absence of the secretary, upon default of proof of any preconcerted design on the part of the two members present, to take advantage of the absence of the third member, in a case where the judges and clerks thus appointed were persons of character and integrity, affords no ground to set aside an election conducted by such appointees.

3. Payment of Poll Tax by Another Person for Voter—Effect.—The vote of a person whose poll taxes were paid not by himself, out of his own means, but by another person, without the voter's request, is an illegal vote, and should be deducted from the poll of the candidate for whom it was cast.

4. Registration—Application for—Necessity That It Be in Voter's Handwriting.—Although the question is not properly raised by the proofs in the case at bar, the court is of opinion that the provisions of § 73 of the Code, requiring the applicant for registration "* * * in his own hand-writing, without aid," etc., is mandatory, and unless the requirement of said section shall have been complied with by the applicant, he is not properly registered and is not a qualified voter.

5. Time for Registration.—A person registering within 30 days of election in which he offers to vote, is improperly registered, and is not a qualified voter in said election.

6. Estoppel.—The principle is well settled that one can not assume successive positions in the course of a suit which are inconsistent with each other and mutually contradictory.

7. Treasurer's List.—Under § 38, article 2, of the Constitution, the county treasurer should embrace in the list of names filed by him as the names of those persons who, not later than six months prior to the next regular election, had paid the state poll taxes required by the Constitution during the three years next preceding that in

which such election is held, the names of such persons only as had personally paid their poll taxes aforesaid.

8. Same.—Section 38 of the Constitution is mandatory The list for which provision is made by said section and § 86b of the Code, wherein the treasurer is required to place the names of all persons who have paid their poll taxes, etc., constitutes the only evidence which the judges of election can entertain in determining whether a person who offers to vote has paid his poll taxes as a prerequisite to voting. No person whose name does not appear on the list, with the exception of persons exempt under the Constitution from the payment of the capitation tax, of those transferred from one county to another and voting by certificate under § 86d of the Code, and of those voting under the provisions of the acts of the General Assembly, 1910, p. 584, as persons just arrived at the age of 21, s entitled to vote in the election. No proof *aliunde* of the payment of these taxes by such a person can be received by the judges of an election in which he offers to vote, as this list is conclusive of the qualification of voters so far as the payment of said poll tax is a prerequisite to the exercise of the right of suffrage.

9. Attack on Right to Vote of Person Voting—Burden of Proof.—Where, in a proceeding under § 160 of the Code, a vote is attacked in the pleadings by one party, on the ground that the name of the voter does not appear on the list of persons who had paid said poll taxes filed, under article 2, § 38, of the Constitution, by the treasurer with the clerk of the circuit court of the county in which said election is held, and certified by the said clerk under said section; and in reply it is alleged by the other party that the said taxes had been paid by such voter in another county, the fact that such person did actually vote, is *prima facie* evidence of his right to vote, and the burden is upon the party asserting it to show his lack of qualification.

10. Treasurer's List—Identity of Names—Presumption—Examples.—Where the right of a person recorded on the poll books as "Walter Bishop" is attacked on the ground that his name does not appear on the list filed by the treasurer with the clerk of the circuit court, under § 38 of the Constitution, but the name of "W. R. Bishop" does appear upon said list, the court will not assume, in the absence of evidence, that Walter Bishop and W. R. Bishop are one and the same person. The same principle is applicable in respect to "William Johnson" and "W. M. Johnson," and "Sam Jeter" and "S. A. Jeter," etc.

11. Fraud.—Where fraud or illegality in an election is so general that it appears that a full and fair expression of the public will has not been obtained, the whole election will be set aside. When the poll can be purged of the illegal votes, this should be done and only the illegal votes should be rejected and the legal votes counted.

But, when this can not be done, the entire poll must be thrown out, if it appears that enough illegal votes have been cast to affect the result of said poll, or to leave it in doubt. The power however, to throw out an entire election, or an entire precinct, is one which ought to be exercised with the greatest care, and only under circumstances which demonstrate beyond all reasonable doubt that the disregard of the law has been so persistent and continuous that it is impossible to distinguish which votes are legal and which are illegal.

12. Conduct of Election—Ballot Boxes—Booths—Noncompliance with Law.—Where, in an election at a certain precinct, it appears that no such ballot box as the statute required, but a mere cigar box, was employed; that no pretense of a booth, and no means to protect the secrecy of the ballot, were provided; that at dinner recess all the election officers repaired to a distant dining room, discontinuing the election and abandoning the polls for some time; that the ballot box was carried by one of the judges to the dining room and placed on the table or bureau during the dinner hour; that other people frequented the dining room while the box was there, although there was no evidence it was tampered with; that a partisan and representative of one of the candidates occupied a room near, if not next to, the one in which the election was being conducted, and publicly dispensed liquor to the electors; that at the close of the polls a crowd, many more than the law allowed, invaded the room in which the ballots were being counted, and some of them, although not officers of the election, took part in the count; and that the polls were not opened until more than one hour after sunrise, although it does not appear that this prevented anyone from voting, the circumstances are such as to vitiate the election at said precinct.

13. Same.—The provision of § 27 of the Constitution declaring that the ballot box shall be kept in public view during the election, is mandatory.

14. Same.—Mandatory constitutional provisions and statutes made in aid thereof, for the holding of an election, must be followed, or the failure will vitiate it. The rule is that a departure from the terms of directory provisions will not render an election void, in the absence of evidence showing that the result of the election would have been changed, or the rights of the voters injuriously affected thereby, but even this rule as to directory provisions applies only to minor or unsubstantial departures therefrom. A radical omission and failure to comply with the essential terms of a directory provision gives rise to a conclusive presumption that an injury must have followed.

15. Same.—Where, in the issues made up in proceeding under § 160 of Code, there appears no allegation of the non-observance of the mandatory provisions of the Constitution, relating to the conduct of an election, the court will not consider proofs of the failure to

observe such provisions, particularly where such proofs tend to show rather the existence of irregularities in the conduct of the election at the precinct in question, than a disregard of the mandatory provisions of the law; that the fact that the ballot box was locked up in the polling place, while the judges retired to dinner, was in itself no more than such an irregularity, and, similarly, a failure of the election officers to provide a booth wherein the voters might prepare their ballots, is in itself no more than an irregularity.

16. Disqualified Officer—Election Not Invalidated—De Facto Officers.—The fact that an election officer is disqualified to serve under the provisions of § 118 of the Code, does not make the election undue, within the meaning of § 160, or in any wise impair the force and effect of said election; such officer, although without the necessary qualification, is a *de facto* officer, and his acts in discharge of the office which he has assumed, are valid.

17. Liquor.—Use of alcoholic liquors by partizans of candidates, for the purpose of influencing electors, while highly reprehensible in morals and in law, will not of itself vitiate the election or require the rejection of the entire vote of any precinct.

18. Ballots Burned.—Burning unused ballots immediately after closing polls and before they had been counted, as required by law, is an irregularity which will not vitiate the vote of a precinct at which this has occurred.

19. Illegal Votes.—It appearing that enough illegal votes were cast at a precinct to change the result at said precinct, but not for whom said votes were cast, the court will not reject the vote of such precinct in toto but will diminish the vote returned for each candidate at said precinct, proportionably to the sum of such illegal votes.

Buford, Lewis & Peterson and *McNeill, Hudgins & Ozlin,* for Contestants.

Henry E. Lee, Geo. E. Allen and *R. H. Mann,* for Contestee.

STATEMENT OF FACTS.

Only so much of the opinion of the court in this cause is here given as involves the principles of law adjudicated in the case. The first portion of the opinion contains mere details of facts alleged in the pleadings, which are of no general importance. The substantial facts are as follows:

At the general election of county officers held in Lunenburg County, on November 7, 1911, C. C. Hatchett, Contestee in these proceedings, and A. B. Bridgeforth, were candidates for the office of treasurer. The return of the commissioners of election, after having canvassed the vote, showed that C. C. Hatchett received

a majority of 29 votes over A. S. Bridgeforth. Contestants, on behalf of Bridgeforth, filed their complaint within ten days of said 7th day of November, 1911, alleging an undue election and false return, specifying various errors and irregularities occurring at said election. To this complaint, Contestee demurred and answered; Contestants then tendered at the hearing at the next term of the court, an amended and supplemental complaint, setting forth the grounds of complaint more in detail and specifying the illegal votes strictly in accordance with the terms of the statute, and the filing of this paper was opposed by Contestee. The court overruled the demurrer of Contestee, upon the ground that the original complaint contained sufficient matter, if true, to entitle Contestants to relief; it also overruled objection to the filing of the amended and supplemental complaint, upon the ground that the original complaint showed sufficient matter to give the court jurisdiction of the cause, and this being true, the amended and supplemental complaint could be properly filed. To this amended and supplemental complaint, Contestee filed an answer and rejoinder, denying the allegations and alleging new matter; to this answer and rejoinder Contestants replied generally, and issue was joined.*

OPINION.

BARKSDALE, J.: Section 160 of the Code provides that in judging of the election or the return the Court shall proceed on the merits thereof and decide the same according to the Constitution and laws, and that when the Contest is decided a certificate of the election shall be granted to the successful party unless he has already received one. "If, however, the Court shall be of opinion that there has been no valid election of any person, the proceedings shall be in conformity with section one hundred and six." While the prayer of the complaint is either that a certificate of election be granted to the said A. S. Bridgeforth or that the said election be declared null and void, and of no effect, and another election ordered, as the case may require, the necessary consequence of declaring the election null and void would be to create a vacancy and impose upon the Court or the Judge thereof in vacation the duty to fill said vacancy by appointment, as no power is given by said section to order another election.

(1) The first attack made by the Contestants is on the action of the Electoral Board in appointing the Judges and Clerks of election. Section 68 of the Code reads: "The electoral board of each city and county shall convene in regular session at such

*Syllabus and statement of facts by Buford, Lewis & Peterson, with the approval of the court.

time in the month of March of each year as the board may prescribe, and at any other time upon the call of any member of the board, but at any special meeting the board shall have the same power as at the regular meeting. At any session two members shall constitute a quorum. The secretary of each election board shall keep in a book provided for the purpose an accurate account of all the proceedings of the board, including all appointments and removal of judges, clerks and registrars, which shall be open to the inspection of any who desire to examine the same at any time, and by section 117, the said board is required in May, 1904, and each year thereafter, to appoint three competent citizens, being qualified voters whose term of office shall begin on the first of June following their appointment, who shall constitute the judges of election for all elections to be held in their respective election districts for the term of one year, or until their successors are appointed, and at the same time appoint two clerks for each place of voting, whose term of office shall be coincident with the judges." By section 69, power is given them to remove from office any and every judge of election, registrar or clerk upon notice, who fails to discharge the duties of his office according to law.

Why the judges and clerks of election were not appointed in March or May as the law requires, and why the board waited until October to appoint them, does not appear, and while the evidence does show possibly an anxiety on the part of J. Wade Fowlkes, chairman of the board, in the appointment complained of, made by him and Neal —— in the absence of Neblett, the other member of the board, to favor Hatchett whom he was supporting, and while the meeting was held at an irregular, and unusual place, it cannot be said that these two members, constituting a quorum of the board, in holding said meeting and making said appointments acted illegally and without authority. Under the circumstances Neblett having been unexpectedly prevented from attending the meeting called at his request for October 14th, it would perhaps have been better to postpone the appointment and call another meeting as requested by him. The evidence, however, shows certainly no preconcerted design to take advantage of his absence, and it is admitted that the judges and clerks appointed were men of character and integrity, and their action certainly gives no ground to set aside the election.

(2) As to the charges of improper and illegal payment of poll taxes made by both contestants and contestee, suffice it to say that as to the charges made against Hatchett the evidence is insufficient to support the charge that the poll taxes of W. A. Cox, H. A. Cox, J. A. Cox, W. C. Hawkins or J. E. Hawkins were paid either by said Hatchett or by any one for him at his in-

stance and request. It further appears that of the above named persons only W. A. Cox voted, and that he voted for Bridgforth. And as to the charge that R. W. Manson, the father-in-law of Bridgforth paid the poll taxes of certain persons, whose names are given, out of his own means, and for, and in behalf of said Bridgforth, the Court is satisfied from the evidence that this charge is not sustained. It does appear, however, from J. H. Crafton's own admissions that his poll taxes were paid by J. G. Blackwell, and not having been paid by himself, out of his own means, and by no request of his, he had no right to vote, and it is further in evidence that he voted for Hatchett, at Kenbridge. His vote should be deducted from Hatchett's poll at that precinct.

Quite a large number of voters have been challenged both by Contestants and Contestee on the ground of improper registration. As only the registration books, and but a few of the applications of the voters challenged were put in evidence, and no other evidence was offered as to whether the said voters complied with the law in making out their applications for registration in their own handwriting, that question cannot properly be passed on, but the Judge of this Court has heretofore in another contested election case, decided by him, ruled that Section 73 of the Code requires the applicant for registration to make application in his own handwriting without aid, etc., was mandatory, and that unless the requirements of said section were complied with by the voter he was not properly registered and not entitled to vote. Of the voters challenged by the contestants as having registered too late, within thirty days of the day of election, after an examination of the registration book at Plantersville and such applications as are filed therewith, and the poll book of said precinct, it appears that the following named persons were improperly registered and should not have been allowed to vote, viz.: N. N. Dodson, E. W. Rutledge, W. J. Thompson, W. A. Wallace, Herbert Marable, W. S. Shelton and W. H. Knight. Bunyon Ashworth was also challenged for the same cause, but his name does not appear on the poll book.

Of the voters challenged by the Contestee on the same ground, J. H. Powers, J. R. Flippin and J. T. Robertson, at Columbian Grove, and J. B. Parrish, J. S. Parham and H. A. Almond at Loch Leven, his contention should be sustained only as to J. R. Flippin, J. B. Parrish and J. S. Parham, the others having been registered on transfers from precincts within the county of Lunenburg by virtue of Section 125 of the Code.

Both Contestants and Contestee challenged quite a large number of votes cast at Lewiston, Pleasant Grove, Plantersville,

Rehoboth, Knights & Olivers, Columbian Grove, Victoria, Kenbridge and Loch Leven, because the names of none of the said persons appeared upon the list of voters who paid their taxes required to be filed by the Treasurer of the County as required by Section 38 of the Constitution and Section 86b of the Code of Virginia; but while in the pleading, the amended complaint of the contestants, and the answer and rejoinder thereto filed by the contestee, they take practically the same position to-wit: that said Treasurer's tax list is final and conclusive, and that all persons not on said list (except those of course whose names were not required to appear thereon) were improperly allowed to vote, and asked that their names be stricken from the poll. In the oral argument the contestee seemed to recede from that position. It has however been repeatedly held as a well settled principle that parties cannot assume successive positions in the course of a suit which are inconsistent with each other and mutually contradictory, but will be held to the defense set up in his pleadings. It becomes necessary therefore for the Court to pass upon and decide this question, which has been construed differently by different Circuit and Corporation judges of this State before whom the question has been raised, but has never been decided by the Court of Appeals of Virginia.

Judge Buchanan in the case of Tazwell *v.* Herman, 108 Va. at page 421, in discussing Section 38 of the Constitution says: "The principal, if not the only purpose for which the list is required to be filed is to provide record, or at least, written evidence that the persons named in the list have complied with the provisions of the Constitution in paying their poll taxes, so far as such payment is made a prerequisite to the right to vote. This appears from the subsequent provisions of that section, which are as follows: 'The clerk within ten days from the receipt of the list shall make and certify a sufficient number of copies thereof and shall deliver one copy for each voting place of his county or city to the Sheriff of the county or Sergeant of the city, whose duty it shall be to post one copy without delay at each of the voting places, and, within ten days from the receipt thereof to make return, on oath, to the Clerk as to the places where and dates of which said copies were respectively posted, which return the Clerk shall record in a book kept in his office, for the purpose; and he shall keep in his office for public inspection, for at least 60 days after receiving the list, not less than ten certified copies thereof, and also cause the list to be published in such other manner as may be prescribed by law; the original list returned by the Treasurer shall be filed and preserved by the Clerk among the public records of his office for at least five years after receiving the same. Within thirty days

after the list has been so posted any person who shall have paid his capitation tax, but whose name is omitted from the certified list, may after five days written notice to the treasurer apply to the Circuit Court of his county or Corporation Court of his city, or to the judge thereof in vacation, to have the same corrected, and his name entered thereon, which application the Court or Judge shall promptly hear and decide. The Clerk shall deliver or cause to be delivered, with the poll books, at a reasonable time before every election, to one of the judges of election of each precinct of his county or city, a like certified copy of the list, *which shall be conclusive evidence of the facts therein stated for the purpose of voting.* The Clerk shall also within 60 days after the filing of the list by the treasurer, forward a certified copy thereof, with such corrections, as may have been made by order of the court or judge to the Auditor of Public Accounts, who shall charge the amount of the poll taxes stated therein to such treasurer unless previously accounted therefor. Further evidence of the prepayment of the capitation taxes required by the Constitution, as a prerequisite to the right to register and vote may be prescribed by law.'" When all the provisions of Article 2 of the Constitution, referred to above, are considered together as they should be in construing Section 38 in the light of the evil which was intended to be remedied (Southerland on Stat. Constr. Secs. 292, 300) we think it is clear that it is intended that the treasurer should embrace in the list the names of only such persons as had personally paid their poll taxes. If this be done then the list will accomplish the purpose for which it was intended. The Courts and Judges will not be required to place upon the list in correcting it, the names of persons who are not entitled to vote, and the judges of election will have before them evidence which shows *prima facie,* at least, who have paid their poll taxes as required as a prerequisite to vote.

This construction, as is argued, does place a power in the hands of the treasurer which may be greatly abused, but his power to say *when* the poll tax of any voter was paid is just as liable to abuse as his power to say how it is paid, yet there can be no question that he has the former power. Why should he not have the latter, when it is no more liable to abuses and is as necessary as the former to carry out the purpose of the framers of the Constitution?

In passing upon the demurrer in the Roanoke contested local option election case (Shultz et als. *v.* Gambill, etc.) Judge Staples says: "Now it is clear from the following language of the section that such list shall be conclusive evidence of the facts therein stated for the purpose of voting taken in connection with an amendment thereto rejected by the convention and appearing on

page 3042 of the record of its proceedings in the following words, 'The production to the officer of election by any person duly registered of his receipt for payment of the capitation taxes prescribed as a prerequisite to the right to vote shall be evidence of such payment, and with the concluding provision of the section authorizing the Legislature to provide further evidence of the payment of the poll tax as a prerequisite to the right to register and vote, and the failure of three regular sessions and one special session of the Legislature to provide any further evidence; that it was beyond cavil, the purpose of the convention, and is the will of the people of Virginia that in passing upon the right of persons to vote at any and all elections, the judge of election shall look to the list so furnished by the Clerk, and if the name of the proposing voter does not thereon appear. then said person cannot lawfully be permitted to vote.'"

As bearing on Sec. 38 and also Sec. 27, of Article 2 of the Constitution, it is said in 8 Cyc., page 762, "The great majority of all constitutional provisions are mandatory, and it is only such provisions as from the language used in connection with the object in view may be said to be addressed to the discretion of some person or department that Courts have held to be directory and their provisions, in most cases, have been addressed to the legislative department with reference to the mode of proceeding in the enactment of law as above stated. But provisions of this kind will be treated as mandatory if the language justifies it, even though the proceedings to which they refer are but formal. Whatever is prohibited or positively enjoined, must be obeyed, therefore all prohibitions and restrictions are necessarily mandatory. So also all provisions that designate, in express terms, the time or manner of doing particular acts, and are silent as to the performance in any manner are mandatory and must be followed." And in the case of Capito *v.* Topping (W. Va.), 64 S. E. 845, it is said in the opinion: "Constitutional provisions are organic. They are adopted with the highest degree of solemnity. They are all intended to remain unalterable except by the great body of the people, and are incapable of alteration without great trouble and expense. They are the framework of the state, as a civil institution, giving cast and color to all its legislation, jurisprudence, institutions and social and commercial life, by confining the legislative, the executive and judiciary within prescribed limits. All the great, potential dominating, creative, destroying and guiding forces of the state are brought within their control so far as they apply." Again on page 302 of 15 Cyc. it is said: "A law requiring the registration of voters as a condition precedent to holding an election is mandatory, and any attempted election without regard to such registration law is a nullity, and the fact

that none but duly qualified electors voted will not help the matter." My conclusion, therefore, is that Sec. 38 of the Constitution is mandatory, and the list required by said section and by Sec. 86b of the Code, wherein the treasurer was required to place the names of all persons who have paid their taxes, etc., was intended to constitute and should constitute the only evidence upon which the judges of election should act as to who have paid their poll taxes as a prerequisite to their right to vote, and that no person whose name did not appear on said list, with the exceptions hereinafter mentioned, should have been allowed to vote in said election. Of course the names of persons exempt from payment of capitation tax do not appear, and are not required to appear on said list. Section 86d of the Code also provides that in case of the voter being transferred from one county to another the certificate of the treasurer of the payment of the tax being exhibited to the judge of election shall entitle said party to vote, and provision is also made by Acts 1910, page 584, for persons who have just arrived at the age of twenty-one years, and whose names are not required to appear on said list. While therefore excluding from the poll all persons not on the treasurer's tax paid list, except old soldiers, I am of the opinion that Geo. E. Allen, voting in Lewiston, whose taxes were paid in Amelia, and E. M. Arvin, voting at Pleasant Grove, and whose taxes were paid in Charlotte are legal voters. The answer alleges that while their names were not on the tax paid list their taxes were paid in Amelia and Charlotte, and their votes having been challenged by the Contestants as illegal, the burden of proof is on them to show that they had no right to vote. The fact that they were allowed to vote is *prima facie* evidence, at least, that they were entitled to vote, and for the same reason I decline to strike from the poll the name of E. L. Wood (at Pleasant Grove) and W. B. Roach (at Rehoboth) who had just attained their majority. In Welsh *v.* Shumway, 83 N. E. 549, it was held that: "Where an elector is permitted to vote the presumption is in favor of its legality, and the burden is on the attacking party to show lack of qualification or forfeiture of the right." See also 15 Cyc. 416-417 and cases there cited, and on page 416, on Burden of Proof, it is said: "In a statutory contest at the suit of a defeated candidate the certificate of the board of canvassers is *prima facie* evidence of the result, and the Contestant whatever may be his ground of complaint, has the burden of establishing it." For the same reason the Court declines to strike from the poll of Bridgforth at Loch Leven the names of R. J. Bailey and W. W. Stone, whose taxes were paid in Brunswick County. The two Hilliards did not acquire a domicile in Lunenburg County in time to entitle them to vote, and they as well as W. R. Bishop and W. M. John-

son are treated as illegal voters, there being no evidence that W. R. and Walter Bishop are one and the same person or that W. M. Johnson is William Johnson. So also the Court cannot assume in the absence of evidence that S. A. Jeter is Sam Jeter, or that W. B. and W. E. Finch are one and the same man.

In the oral argument it was argued by the Contestants that there was sufficient evidence before the Court, of irregularities, illegalities and misconduct of the judges of election to justify the Court in throwing out the entire poll at Meherrin, Plantersville and Lewiston, and that the Court should unquestionably either set aside the whole election or award the certificate of election to Bridgforth.

In State ex rel. Davis *v.* State Board of Canvassers, 68 S. E. 676, Court says: "Where fraud or illegality in an election is so general that it appears that a full or fair expression of the popular will has not been obtained, the whole election will be set aside. When the polls can be purged of the illegal votes this should be done, and only the illegal votes should be rejected and the legal ones should be counted. But when this cannot be done the entire poll must be thrown out if it appears that enough illegal votes have been cast to affect the result at such poll or to leave it in doubt." And in 15 Cyc. at page 372, it is said: "But the power to throw out the entire division is one which ought to be exercised with the greatest care and only under circumstances which demonstrate beyond all reasonable doubt that the disregard of the law has been so fundamental or so persistent and continuous that it is impossible to distinguish what votes are lawful and what are unlawful."

It is with great reluctance and hesitation that the vote of any precinct in this election is thrown out, but the disregard and violation of the plain mandate of the Constitution and the requirement of the statute in regard to the care of the ballot box, the arrangement of the booth and protecting the secrecy of the ballot, and counting the votes have been so flagrant and persistent at Meherrin that no other result can follow. The officers conducting the election may have been and doubtless were honest and good men, and no fraud has been proven, but their whole conduct amounts to such gross negligence as to leave the Court no alternative. In the interest of honest, orderly and fair elections, the Court feels it to be its duty to place the stamp of its disapproval on this precinct. The occurrences there on election day are strikingly similar to the facts reported in Tebbe *v.* Smith, 29 L. R. A. at page 676, cited in argument by counsel for Contestants. Sec. 27 of the Constitution provides that: "The ballot box shall be kept in public view during all elections." At Meherrin there was no such ballot box as the statute requires, only

an insecure cigar box. No pretense of a booth, and no provision to guard or protect the secrecy of the ballot. At the dinner recess all hands repaired to the dining room, discontinuing the election and abandoning the polls for some time. What became of the poll books does not appear, but the ballot box was carried by one of the judges under his arm, to the dining room, and placed on the table or bureau during dinner. Other people came into the dining room while the box was there, but there is no evidence that it was tampered with. W. Y. Fowlkes, a partisan and representative of the Contestee occupied the room near to, if not next to the one occupied by the election officers, and publicly dispensed liquor to the electors, and at the close of the poll quite a crowd, many more than the law allowed invaded the room where the ballots were being counted, and some of them, although not election officers, took part in the count. The polls were not opened until after more than an hour after sunrise, though it does not appear that this prevented any one from voting. Quoting from Tebbe *v.* Smith, *supra*: "It is the rule that mandatory provisions for the holding of an election must be followed, or the failure will vitiate it. While a departure from the terms of a directory provision will not render it void, in the absence of a further showing that the result of the election has been changed, or the right of the voters injuriously affected thereby. But the rule as to directory provisions applies only to minor and unsubstantial departures therefrom. There may be such radical omissions and failures to comply with the essential terms of a directory provision as will lead to the conclusive presumption that the injury must have followed. A substantial compliance with the terms of directory provisions is after all required. And such a substantial compliance is not had by strictly following some provisions and failing to observe others. There must be reasonable observance of all the prescribed conditions. It is the duty of the Courts so far to adhere to the substantial requirements of the law in regard to elections as to preserve them from abuses subversive of the rights of the electors. And under this view the question becomes a broader one than can be disposed of by answering that in the individual case no harm results. Thus in Knowles *v.* Yeates, 31 Cal. 82, the contention of appellant was that admitting that there was no fraud, and that the votes were cast by qualified electors, still the fact that in certain precincts the polls were open without reason at long distances from the appointed place, was in itself enough to call for the rejection of the votes. And this Court so held. Likewise in the case of People *v.* Seale, 52 Cal. 71, where no question of fraud or injury was involved, but where at an election called for voting a school tax, the polls were open at one o'clock

p. m. and closed at six, instead of being opened one hour after sunrise and kept open until sunset, as the law then required, this Court without hesitation declared the election invalid. In this case we are quite willing to believe that the misconduct of the officers of Lake precinct was prompted by nothing worse than ignorance and lack of appreciation of the responsibilities of their position, and we may say further, for such is the evidence, that no harm is shown to have resulted from their conduct, but looking to the purity of elections and integrity of the ballot box, we are constrained to hold that conduct like this amounts in itself to such a failure to observe the substantial requirements of the law as must invalidate the election. And while reluctant so to hold in this instance, we are confirmed in the opinion by consideration of the fact that any other interpretation would add grave perils to the safe conduct of our elections, which are already harassed by dangers enough."

In Van Amringe *v.* Taylor, 12 S. E. P. 1005, at page 1006, Merriman, C. J., says: "An election without the sanction of law expresses simply the voice of disorder, confusion and revolution, however honestly expressed. Government cannot take notice of such voice until it shall in some lawful way take on the quality and character of lawful authority. This is essential to the integrity and authority of Government. It is not sufficient that it be simply conducted honestly. It must as well have legal sanction. The statutory provisions and regulations in respect to public elections in this state must be observed and prevail, certainly in their substance, otherwise the election will be void and will be so treated. Therefore the contention that if the election in question was simply conducted fairly and honestly it was valid, is unfounded." In 15 Cyc. at page 365 it is said: "In addition to the officers of election as a rule the several political parties are entitled to challengers to be present at the polls when they are opened and to watchers to be present at each voting place during the count, but the presence of unauthorized persons should be prevented, and if tolerated may result in the rejection of the entire vote, especially where there has been opportunity for the practice of fraud." The vote of Meherrin precinct will therefore be rejected. I do not think, however, that I am warranted by the pleadings and the evidence to reject the entire poll of any other precinct. The Court has been asked, as I have already said, in the oral argument, to exclude the entire vote both at Plantersville and Lewiston. No charges, however, are made by the Contestants in either of their complaints of the absence of the booth or any other improper conduct on the part of the election officers in the conduct of the election, save and except the general charge of an undue election; that at both of the pre-

cincts and others, the persons irregularly, illegally and improperly chosen to officiate as election officers were hostile to the interest of Bridgforth and favorable partisans of Hatchett; that at said Plantersville precinct not as many as 86 votes were legally cast, and that the return showing that Bridgforth received 6 and Hatchett 80 votes, there was a false return, and they gave the names of 15 voters which they challenge on the ground that they had no right to vote because their names do not appear on the Treasurer's tax paid list. Nor is any special allegation of fraud, illegality or misconduct such as would vitiate the whole poll made against Lewiston. And while it appears from the evidence that at Plantersville there was no booth, and that the ballot box, etc., was locked up at Lewiston while the judges were eating dinner, and there are other irregularities which according to the evidence were permitted at these precincts by the election officers, they were only irregularities, not in any wise comparable to the conduct of the election at Meherrin, and in no wise interfering with the orderly course of voting. And while Mosely, one of the Judges at Plantersville, may have been guilty of gross impropriety, and manifested a pernicious activity in favor of Hatchett, taking all that is in the testimony as literally true (although no such allegations are set out in the pleadings and under the decision should not be considered, see State *v.* State Board of Canvassers, 68 S. E. 676), I do not feel warranted in depriving a precinct of its vote because of the misconduct of an election official. In Moyer *v.* Van De Vanter, 29 L. R. A. page 670, it is held that: "The fact that the election officers failed to have boothes erected which complied with the law, was but an irregularity which would not vitiate the election."

As to the charge that 116 of those who cast their ballots at Meherrin, Pleasant Grove, Knights & Olivers, Rehoboth, Plantersville, and Lewiston in said election for Hatchett were not legally registered, no evidence was offered to support it. An examination of the poll books show that R. L. St. John was not a judge of election at Rehoboth.

As to the charge of the Contestee in his counter complaint that W. F. Bacon was a candidate for justice of the peace in Loch Leven district and acted as judge of election at Loch Leven precinct, it does appear from the poll book that this is true and that F. W. Bridgforth, deputy for A. B. Shackleton, Sheriff, acted as judge of election at Kenbridge, and that said Shackleton was a candidate for Sheriff.

As these objections are not mentioned in the oral argument I take it that they are not insisted on seriously. It is undoubtedly true, however, that both Bacon and Bridgforth were disqualified under Sec. 118 of the Code. This same question arose before

Judge Christian in the Lynchburg contested local option election case of Anderson, etc. *v.* Craddock, etc., reported in September, 1911, number of the VIRGINIA LAW REGISTER, page 359. Judge Christian says: "It is not necessary to enter into the question here whether the provisions in the Constitution disqualifying them is directory or mandatory, conceding their disqualifications, the question presents itself, How did the disqualification make the election undue, or what answer does the law make to this contention? Each was an election officer *de facto,* and it seems to the Court that the result of the performance of the duties of the officers *de facto* has been settled for many years in English Jurisprudence and by numerous decisions within the State. Lord Ellenborough defines an officer *de facto* as follows: "An officer *de facto* is one who has the reputation of being the officer he assumes to be, and is yet not a good officer in point of the law."

In McCraw *v.* Williams, 33 Grat. 513 (a Halifax case involving the tenure of the office of county judge), it is said: "An officer *de facto* is one who comes in by the power of an election or appointment, but in consequence of some informality or want of qualification, cannot maintain his position when called upon by the government to show by what title he holds his office." There is no distinction made in law between constitutional and statutory disqualifications. In that case the Court held that the acts of Judge Armistead, the *de facto* judge (Judge Barksdale being declared in the same opinion to be the *de jure* judge) in trying and sentencing a prisoner, were valid and binding, and thus enunciated the law in reference to acts of officers *de facto:* "The rule which declares that acts of an officer *de facto* are as valid and binding as if he were an officer *de jure,* is founded on the soundest principles of public policy and is absolutely essential to the protection of the best interest of society. Indeed the affairs of society could not be conducted on any other principle. To deny the validity of the acts of such officers would tend to confusion and insecurity in public as well as private affairs, and thus oppose the true policy of every regulated State. In brief, acts rightly done shall not be annulled because of the disqualification of the doer."

Bacon and Bridgforth then were certainly *de facto* officers, and their acts unless shown to be otherwise fraudulent or wrong (as they have not been) cannot be set aside. Where names of contested voters are not given in this opinion, I have omitted them because they either did not vote, their names not appearing on the poll book (for example Frank Owens), or their names, though challenged nevertheless do appear on the Treasurer's list, or they are found to be exempt from payment of tax.

As to the charges of debauching voters by use of whiskey, the only specific instances proved are H. A. Poole, who voted for Bridgforth at Knights & Olivers, and J. H. Crafton, who voted for Hatchett at Kenbridge, and while he denies it, and there is some conflict of evidence, the testimony tends strongly to prove that there was an illegal payment of the poll taxes, of the said Crafton by J. G. Blackwell. My decision, therefore, is that each of these cast an illegal vote, Poole's will be deducted from Bridgforth and Crafton's from Hatchett. The evidence does not support the charge that the poll taxes of a large number of persons or of any person at Lewiston, or any other precinct were paid by Henry Wood, A. B. Shackleton or other friends of the Contestee, for him in his behalf, and while charges and counter charges have been made by both Contestants and Contestee as to the unlawful payment of capitation taxes and the unlawful and improper use of money and whiskey, the evidence falls short of proof that there has been any violation of the Barksdale Pure Election Law by either Bridgforth or Hatchett, or their friends. There is, however, abundant evidence that at several precincts whiskey for the purpose of influencing and debauching the electors was used liberally and indiscriminately by the friends of both candidates. While this is deplorable and greatly to be condemned by all lovers of decency, purity and orderly elections, it is not sufficient to vitiate the election or to reject the entire vote of any precinct. To deter similar practices and violations of the law in the future, however, the attorney for the commonwealth will be requested to see that these shameless and disgraceful violations of the law are investigated by the grand jury, and that no guilty person shall be allowed to escape his just measure of punishment. That the election officers were not as careful as the law required them to be in regard to permitting crowds to assemble at and around the polls, and within less than forty feet of the voting booth, at several of the precincts, abundantly appears from the evidence, but these were harmless irregularities and omissions, occurring as often and as much at precincts carried by one candidate as by the other, and neither these things nor the admission of more persons in the voting booths than the law permitted, will justify the Court in setting aside the election, or rejecting the vote of any such precinct.

The vote of Douglas Rudd will be stricken from the poll as hereinafter explained, but there is no evidence as to how he voted.

It is admitted that at Pleasant Grove the poll is incorrect and should show that Bridgforth received 16 votes and Hatchett 105. It is shown by the poll book that Maynard Fowlkes did not vote at Lewiston and that Frank Owens did not vote in said election.

While unused ballots at Kenbridge may have been burned immediately after the close of the polls or before they were counted, this is an irregularity for which the election at that precinct should not be disturbed. No evidence was offered to sustain the charge made by the Contestee that at Victoria 16 persons, whose names are given, were allowed to vote, and voted for Bridgforth, though illegally transferred from Kenbridge.

After a careful and painstaking examination of the record, complaint, demurrer and answer, amended complaint, and answer and rejoinder, the depositions taken and filed, the poll books, registration book, Treasurer's tax paid list, and permanent registration roll, which has necessitated much time and labor, care and anxiety and many wakeful nights, I have carefully eliminated from the list of votes challenged, both by Contestants and Contestee, the names of all old soldiers and those whose names did not appear on the Treasurer's tax paid list, and appended hereto will be found a list of illegal votes at each precinct. At Columbian Grove J. R. Flippin is shown to have voted for Bridgforth, so he is deducted from Bridgforth's poll there; at Knights & Olivers H. A. Poole is deducted from Bridgforth's poll, and at Kenbridge J. H. Crafton is deducted from Hatchett's poll. At Loch Leven all of the 21 illegal votes are deducted from Bridgforth, it being admitted that the one vote received at that precinct by Hatchett was cast by Sid Saunders. Not counting J. H. Crafton, 15 illegal votes were cast at Kenbridge, 2 at Lewiston, 3 at Pleasant Grove, 11 at Plantersville, 8 at Reheboth, 5 at Knights & Olivers, not counting H. A. Poole, 9 at Columbian Grove, including J. R. Flippin, who voted for Bridgforth, 6 at Victoria and 21 at Loch Leven, all of whom it is admitted voted for Bridgforth. It is contended by the Contestants that as the evidence shows that enough illegal votes have been cast to change the result, that although he may not have shown that enough of them were cast for Hatchett to overcome his majority, that nevertheless the court should declare that there was an undue election and that neither Hatchett nor Bridgforth has been elected. I cannot concur in this view, and a different view is laid down in McCreary on Elections, and in the case of Ellis ex rel. Reynolds *v.* May (Mich.) 25 L. R. A. p. 331, the court in its opinion says: "We now come to the other portion of the charge where in substance the jury were directed that they should take the illegal votes from the total vote, proportionately, according to the entire vote returned for each candidate in that district. In this we think the Court under well settled rules was entirely correct. It is a fair way to arrive at results. The rule is based upon the proposition that the illegal votes have gone into the boxes without the fault of either can-

didate. If these illegal votes can be separated from the legal ones so that the number is substantially ascertained, then the poll is too large by exactly that number and they must be cast out. In casting them out the rule laid down by the Court below is sustained by McCrary on Elections, 3d edition page 460, where it is said: "Of course in the application of this rule such illegal votes should be deducted proportionately from both candidates according to the entire vote returned for each." In 6th Am. and E. Encyc. of Law, page 353, it is said: "Where more ballots are found in the ballot box than there are names on the poll list, the statutes of many States require the officers of election to draw out enough ballots without seeing them to make the number equal to that of the voters. And where they have not done this it is probable that no other mode would be preferable to that of deducting from each candidate a number of votes proportioned to his total vote compared with the aggregate vote of the precinct." And in 15 Cyc. at page 372, it is said: "In the absence of the evidence that illegal voters at any election were given for any particular candidate, it is not error to proportion among the several candidates and deduct them pro rata from their respective scores." Citing in addition to the case above quoted from 25 L. R. A., Russell *v.* McDowell, 83 Cal. 70, 23 Pac. 183, and Heyfron *v.* Mahoney, 9 Mont. 497, 24 Pac., as the judge who delivered the opinion in the Michigan case says, I think it is true that "While we have no statute directing this mode of apportionment, yet the rule we think is one which does no injustice to either candidate and in the end carries into effect as nearly as may be, the will of the people, as expressed at the polls."

Throwing out the vote of Meherrin and adopting this method of disposing of the illegal votes cast at each precinct, whose names will be appended to this opinion, we get the following results:

	Bridgforth	Hatchett
Loch Leven	188-21-167	1
Kenbridge	138-11-127	54- 5- 49
Lewiston	38- 3- 35	64- 5- 59
Pleasant Grove	16- 1- 15	105- 2-103
Plantersville	6- 1- 5	80-10- 70
Rehoboth	2- 0- 2	111- 8-103
K. & O.	9- 2- 7	33- 4- 29
Col. Grove	78- 7- 71	26- 2- 24
Victoria	27- 4- 23	17- 2- 15
Total legal vote	452	453

from which it appears that Hatchett has received a majority of

one of the legal votes cast. To explain the above table; take for example Columbian Grove where the total vote was 104. Nine illegal votes were cast there and no proof as to how any of them voted, except J. R. Flippin, who voted for Bridgforth. The unaccounted for illegal vote (8) is .776 per cent. of the returned vote, hence each candidate loses .776 per cent. of the votes cast for him. So, in addition to Flippin, I deduct 6 (or total of 7) from Bridgforth and 2 from Hatchett, and the same rule has been followed as to all the other precincts.

It is, therefore, the opinion and judgment of the court that C. C. Hatchett has received a majority of one (1) legal vote cast in said election of November 7, 1911, and he has been duly elected County Treasurer for Lunenburg County. And a certificate of election having already issued to him, no further certificate is necessary. An order will be entered in accordance with these views.